Filed 5/11/15 In re A.F. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.F., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. C.L., Defendant and Appellant.	E062060 (Super.Ct.No. INJ1300131) OPINION

APPEAL from the Superior Court of Riverside County. Lawrence P. Best, Temporary Judge. (Pursuant to Cal. Constr., art. VI, § 21.) Affirmed.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and Appellant.

Gregory P. Priamos, County Counsel, and Julie Koons Jarvi, Deputy County Counsel, for Plaintiff and Respondent.

Defendant and appellant C.L. (Father) appeals from the juvenile court's post-dispositional order terminating his visitation with his four-year-old son A.F. On appeal, Father argues that the juvenile court abused its discretion in terminating his prison visits with his son because there was no substantial evidence to support a finding of detriment.[1] We reject this contention and affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

The family came to the attention of the Riverside County Department of Public Social Services (DPSS) in April 2013 when the child was taken into protective custody due to severe neglect and caretaker absence/incapacity following his parents' arrest. The reporting party stated that law enforcement had served a drug-related search warrant at the parents' residence and recovered over one pound of methamphetamine and numerous firearms. In June 2013, the allegations were found true and Father was provided with six months of reunification services. Mother was provided with family maintenance services. In November 2013, Mother was granted sole physical and legal custody of the child, and Father was ordered to have no visitation until he had appeared in family law court. The dependency was thereafter terminated.

Approximately three months later, on February 20, 2014, DPSS received an immediate response referral alleging general neglect and caretaker absence/incapacity after the parents had again been arrested on drug-related charges. Officers of the

[1] B.F. (Mother) is not a party to this appeal.

Coachella Valley Narcotics Task Force had served a search warrant at the family residence and located five pounds of methamphetamine in the backyard. Officers also found 120 grams of heroin, 15 large marijuana plants in the yard, a large amount of U.S. currency, a bank deposit receipt in excess of $19,000 made in a bank in Mexico, a shotgun on top of a small shed in the yard, and numerous other firearms. Father had a criminal history and was on probation. Father had not been consistently employed and had intermittently provided financial support for the child. Mother reported that Father had spent more time in jail than with the child and that the child was "fine" when Father was not around.

The child was taken into protective custody and placed in a confidential foster home. On February 24, 2014, a petition was filed on behalf of the child pursuant to Welfare and Institutions Code[2] section 300, subdivisions (b) (failure to protect) and (g) (no provision for support).[3]

At the February 25, 2014 detention hearing, the child was formally detained from his parents. The parents had requested no visitation while they were in custody and the juvenile court ordered no visitation while the parents were in custody pending further order. The parents, however, were provided with weekly telephone contact with the child

[2] All future statutory references are to the Welfare and Institutions Code unless otherwise stated.

[3] Once the parents were released from custody, the petition was amended to delete the subdivision (g) allegation.

while they were in custody, and visitation was ordered to occur upon the parents' release from custody.

The foster mother reported that after a telephone call with his parents, the child "cried so hard he vomited and defecated on himself." The foster mother also reported that after the first face visit with the parents, the child had again cried uncontrollably and vomited while the foster mother walked the child to her vehicle after the visit. The social worker reported that the child had a "very strong bond" with Mother; and that as the child became more comfortable in the foster home, he had stopped vomiting at the end of visits with his parents

The jurisdictional/dispositional hearing was held on March 17, 2014. At that time, the juvenile court found the allegations in the amended petition true and declared the child a dependent of the court. The parents were provided with reunification services and ordered to participate. The prior visitation order was to remain in full force and effect.

On March 10, 2014, the child was placed with his maternal aunt and had adjusted well. The child was bonded to his relative caregivers and had a very close bond to his cousins.

By the time of the six-month review hearing, DPSS recommended that Father's services be terminated because he was incarcerated and would remain incarcerated for three years in Ventura County. On March 25, 2014, Mother and Father had been arrested in Ventura County for drug-related activities. Following their convictions for transportation of drugs and possession of drugs for sales with an enhancement violation for having a large amount of methamphetamine in their possession, Mother had spent 296

days in Ventura County jail and was released on mandatory supervision on August 22, 2014, and Father had been sentenced to three years in prison. Neither parent had made progress in their case plan. Despite Mother's third arrest for drug-related offenses and her continued lifestyle of selling and transporting drugs, due to the child's age, DPSS recommended that Mother receive an additional six months of services.

The parents were unable to visit the child while incarcerated in Ventura County. Mother had two supervised visits with the child since her release. The visits reportedly had gone well. There were no reported visits with Father since his incarceration. Father's last visit with the child was on March 10, 2014.

At the September 17 and 18, 2014 six-month review hearings, the juvenile court terminated Father's services and continued Mother's services for an additional six months. Father's counsel requested Father be provided with monthly or bimonthly visits with the child, noting that it was a long distance from Coachella to Ventura, but that "he has had one visit while in custody in Santa Barbara County."[4] Father's counsel also stated that Father had informed him that "on one occasion the relative has transported" the child, but counsel was not sure whether the relative was willing to or able to. Minor's counsel objected to a visitation order. The court found that visitation with Father would be detrimental to the child due to the length of Father's incarceration, distance to the jail, and the child's young age, and denied Father's request for visitation while incarcerated in

[4] Father's counsel at one point mistakenly stated that Father was incarcerated in "San Bernardino County" jail and at other times stated "Santa Barbara County." When the juvenile court inquired whether Father was going to be in custody in Ventura County, Father's counsel stated, "Yes, for two years."

Ventura County. The court also denied Father's request for telephone contact, but ordered DPSS to provide Father with photographs of the child.

II

DISCUSSION

Father does not challenge the juvenile court's order terminating reunification services for him. Father contends only that the juvenile court erred in sua sponte terminating his visitation with the child.[5] He asserts that the evidence did not support a finding that prison visitation was detrimental to the child. We find no error.

To terminate visitation after reunification services have been terminated, the court must find, by a preponderance of the evidence, that continued visitation would be detrimental to the child. (*In re Manolito L.* (2001) 90 Cal.App.4th 753, 760; § 366.21, subd. (h).) We will review the court's factual finding of detriment for substantial evidence. (*In re Mark L.* (2001) 94 Cal.App.4th 573, 580-581) "In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are

[5] In the court below, DPSS did not request that Father's visitation be terminated. However, DPSS also did not object to the juvenile court's order denying/terminating Father's visitation. On appeal, DPSS argues that substantial evidence supports the juvenile court's order and that the order should be affirmed. As DPSS points out, " 'Although it is the appellant's task to show error, there is a corresponding obligation on the part of the respondent to aid the appellate court in sustaining the judgment. "It is as much the duty of the respondent to assist the court upon the appeal as it is to properly present a case in the first instance, in the court below." [Citations.]' " (*Pack v. Kings County Human Services Agency* (2001) 89 Cal.App.4th 821, 826, fn. 5.)

the province of the trial court. [Citation.]" (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.)

During the reunification period, visitation is mandatory absent exceptional circumstances. (§ 362.1, subd. (a)(1)(A); *In re S.H.* (2003) 111 Cal.App.4th 310, 317.) Even an incarcerated parent may not be denied visitation during the reunification period except upon proof of clear and convincing evidence that it would be detrimental to the child. (*In re Dylan T.* (1998) 65 Cal.App.4th 765, 773; *In re Brittany S.* (1993) 17 Cal.App.4th 1399; *In re Jonathan M.* (1997) 53 Cal.App.4th 1234, 1237, disapproved on another ground as stated in *In re Zeth S.* (2003) 31 Cal.4th 396, 413; § 361.5, subd. (e)(1) [generally, visitation must be provided to incarcerated parents].) As previously noted, after reunification services have been terminated, visitation is still mandatory absent a finding of detriment. (§ 366.22, subd. (a) ["The court shall continue to permit the parent or legal guardian to visit the child unless it finds that visitation would be detrimental to the child."]; *In re D.B.* (2013) 217 Cal.App.4th 1080, 1094-1095.)

By contrast, where no reunification services have been ordered at all, visitation is discretionary, not mandatory. Where reunification services are denied, visitation is governed by subdivision (f) of section 361.5, which provides: "The court *may* continue to permit the parent to visit the child unless it finds that visitation would be detrimental to the child." (Italics added.) In *In re J.N.* (2006) 138 Cal.App.4th 450, 458, the court explained that the permissive language in section 361.5, subdivision (f), reflects the reality that "visitation is not integral to the overall plan when the parent is not participating in the reunification efforts." (*In re J.N.*, *supra*, 138 Cal.App.4th at pp. 458-

459.) The child in *J.N.* was 20 months old when the mother was incarcerated for voluntary manslaughter after the child's sibling died while in the care of the mother and her boyfriend. The mother received no reunification services and the child was placed with the father. When the child was 10 years old, he was declared a dependent child as a result of the father's failure to protect the child from abuse by the maternal grandparents with whom the child was living. Although mother did not receive any reunification services, she requested telephone visitation. The dispositional order did not include a provision for telephone contact with the mother. The appellate court rejected the mother's challenge to the order, explaining: "[T]he court may deny visitation to an incarcerated parent who has been denied reunification services, even in the absence of any showing that continued visitation would be detrimental to the child." (*In re J.N.*, *supra*, 138 Cal.App.4th at p. 460.)

Therefore, when reunification services are being provided, it is error to deny visitation with the parent to whom the services apply unless there is sufficient evidence that visitation would be detrimental to the child. (*In re Jonathan M.*, supra, 53 Cal.App.4th at p. 1238 [arbitrary geographical limit of 50 miles insufficient]; *In re Dylan T.*, *supra*, 65 Cal.App.4th at pp. 773-774 [denial of visitation improperly based upon minor's age alone]; *In re Brittany S.*, *supra*, 17 Cal.App.4th at pp. 1406-1407 [denial of visitation improper where mother incarcerated only 40 miles distant].)

To evaluate the juvenile court's order here terminating visitation, we take some guidance from section 361.5, subdivision (e)(1), which describes factors to consider in making a finding of detriment to decline to order reunification services for an

incarcerated parent. That section provides in part, "In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the length and nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not offered, . . . and any other appropriate factors." (§ 361.5, subd. (e)(1).) The finding of detriment may be express or implied from the record. (*In re Steve W.* (1990) 217 Cal.App.3d 10, 27.)

Here, substantial evidence supports the juvenile court's finding that visitation with Father while incarcerated would be detrimental to the child. Father's services were terminated at the six-month review hearing. At that time, the juvenile court denied Father's request for visitation finding visitation was detrimental to the child based on Father's length of incarceration, the distance to the jail, and the young age of the child. Unlike the cases relied on by Father, *In re Dylan T.*, *supra*, 65 Cal.App.4th at pp. 773-774 (solely based on age of child) and *In re Jonathan M.*, *supra*, 53 Cal.App.4th at p. 1238 (solely based on geography), here the court did not pick one arbitrary factor and find it determinative of the no-visitation order. Rather, the court looked to all of these factors together, as well as the fact visitation here would serve no reunification purpose. While the juvenile court cannot impose arbitrary limits on the distance a child must travel for visitation, "[t]his is not to say the court must necessarily dispatch an infant on a 275-mile trip to visit an incarcerated parent. That may or may not be useful, depending on the circumstances of a particular case. Above all, reunification services are to be reasonable. [Citation.] . . . [D]istance is a factor to be considered in the analysis." (*In re Jonathan M.*, *supra*, 53 Cal.App.4th at p. 1238.)

The child was placed with his maternal aunt in Coachella while Father was incarcerated in Ventura County. He was to remain incarcerated for two to three years. The distance between the two locations is likely over 200 miles. The child was four years old when Father's visitation was terminated. Father had last visited with the child on March 10, 2014. And, about two weeks later, he was arrested for transportation of drugs and possession for sale of drugs with an enhancement violation for having a large quantity of methamphetamine. This was Father's *third* arrest for drug-related activities in less than one year. Father's repeated drug violations and incarcerations demonstrated he had not resolved the problems that harmed his child. He continued to fail to deal with his drug problem, was usually incarcerated, and, when not incarcerated, inflicted his debilitating lifestyle on his family.

Furthermore, contrary to Father's claim nothing in the record establishes that the child was bonded to Father. Mother had reported that Father had spent more time in jail than with the child and that the child was "fine" when Father was not around. There is no evidence in the record to show that the child showed any emotional attachment to Father. This is unsurprising as Father had been largely absent from the child's life because of his repeated incarcerations. Given the child's young age and the nature of the limited contact the child had with Father, it is reasonable to presume that there was no existing bond between the child and Father that a lack of visitation could disrupt.

Father asserts that the child had visited him "at the Ventura County correction facility with no harmful effects." However, there is no evidence in the record to support this assertion. Father's counsel had informed the court that a relative had transported the

child on one occasion for visitation. Nonetheless, Father's counsel did not state where Father was located at the time of this one visit. There is also no evidence in the record to suggest whether or not the parental visitation while in jail was harmful to the child.

Even if we assume the child suffered no harmful effect during a jail visit with Father, based on the child's young age, the length of Father's incarceration, the distance to the jail, and the lack of bond between the child and Father, we cannot conclude the juvenile court erred in finding it would be detrimental for the child to visit Father while incarcerated in Ventura County. We find no error in the court's conclusion of detriment.[6]

III

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

KING
J.

[6] We disagree with Father's claim that "the juvenile court confused [F]ather's request for more visitation with a request that [DPSS] provide transportation of the [child] to those prison visits." The record belies this contention.